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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

JEROME S. SPEVACK, *Petitioner,*

v.

LEWIS L. STRAUSS, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Jerome S. Spevack, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

No part of the present Petition or its appendices contains any disclosure of the secret process involved, or of documents containing alleged disclosures thereof, forming the basis of the impounding order of the Court of Appeals. Under this Court's order of November 4, 1957 (Appendix H, p. 25a), Respondent's counsel should observe the same caution.

OPINIONS BELOW

The District Court rendered no opinion on entering its Findings of Fact and Conclusions of Law, and Order Denying Petitioner's Motion for a Preliminary Injunction. (R. 17, J.A. 17).

The opinion of the Court of Appeals (Appendix B, *infra*, pp. 6a-9a) is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 19, 1957. (Appendix C, *infra*, p. 9a). Petitioner's petition for rehearing (R. 95-120) was denied October 25, 1957 (R. 123). The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254.

QUESTIONS PRESENTED

1 (*Statutory Construction*). Whether the Atomic Energy Act of 1954 is correctly interpreted to direct or authorize the Respondents to deprive a citizen of private property rights in his invention, forming the subject matter of a pending U. S. patent application, and disclosed to the U. S. Atomic Energy Commission (sometimes termed A.E.C. hereinafter) in confidence in accordance with law, by publishing and/or publicly disseminating said subject matter without regard to the proprietary rights of the inventor thereof, without his consent, and to his detriment, where such Act makes no provision for just compensation or due process of law for such deprivation.

2 (*Constitutionality of Statute*). Whether Sections 3(b), 141 and 141(b) of the Atomic Energy Act of 1954 (42 U.S.C. Secs. 2013(b), 2161, and 2161(b))—interpreted to direct or authorize the Respondents to publish and/or publicly disseminate the subject matter of Petitioner's invention not owned by the United States (which is the subject of a pending U. S. patent application, and was disclosed to the A.E.C. in confidence by Petitioner and by the Patent Office in accordance with law) and thereby deprive the Petitioner of property rights in his said invention without his consent—are unconstitutional where said Act fails to provide for just compensation or due process of law for

such deprivation, as required by the Fifth Amendment to the Constitution of the United States.

3 (*Whether unconsented suit v. U. S. under circumstances*). Whether an action, brought by a citizen of the United States against the Respondents to enjoin them from publishing and publicly disseminating his invention to his detriment, is an unconsented suit against the United States of which the Courts have no jurisdiction, where (a) the citizen's proprietary interests as an inventor and applicant for U. S. patent include the prerogative, until a patent issues, of maintaining his invention in secret for preserving his right to seek patent protection and promotion thereof in foreign countries as well as in the United States; where (b) the subject matter of a United States patent application is required to be maintained in secrecy by the United States Government under 35 U.S.C., Sec. 122; where (c) the invention and U. S. patent application were disclosed to the A.E.C. in confidence as required by law, and subjected, at the instance of said Commission, to security classification and a "Secrecy Order" issued in the U. S. Patent Application under 35 U.S.C. Sec. 181; where (d) such security classification and "Secrecy Order" prohibited the inventor from making applications for foreign patents on his invention under the International Convention and thereafter, until the subject matter was declassified and the Secrecy Order rescinded on February 1, 1957, because the A.E.C. refused to consent to modification of the "Secrecy Order" to permit the making of such applications; where (e) the publications threatened by respondents would destroy petitioner's proprietary rights in his invention including his right to apply for and obtain valid patents therefor in many foreign countries; where (f) there is no express direction to the respondents in the

Atomic Energy Act of 1954 to publish or publicly disseminate any invention not owned by the United States; and where (g) there is no provision in said Act for compensation to the owner of an invention, disclosed to the Atomic Energy Commission in confidence, for property rights destroyed by public dissemination thereof by said Commission without his consent.

4 (*Denial of Statutory Procedural Relief*). Whether the Court of Appeals abused its discretion and acted in a manner contrary to the proper functioning of the Federal Judiciary in denying the Petitioner leave to amend the jurisdictional allegations of his complaint under Rule 15 of the Federal Rules of Civil Procedure and under 28 U.S.C. Sec. 1653 to obtain a ruling on the merits without circuity of action, where (a) no answer had yet been filed to the complaint by the respondents, where (b) the respondents had contended in the District Court that the action was an unconsented suit against the United States, where (c) the District Court ruled that it did have jurisdiction, but denied a preliminary injunction on other grounds, where (d) the Court of Appeals made the first ruling that the case should be considered an unconsented suit against the United States and that the jurisdictional allegations of the complaint were insufficient, and where (e) the motion for leave to amend was filed promptly after such ruling.

5 (*Denial of benefit of Rule 15 F.R.C.P. not Warranted by "Larson" Case*). Whether the Court of Appeals erred in issuing, and abused its discretion and acted in a manner contrary to the proper functioning of the Federal Judiciary in refusing to modify on petition for rehearing, its decision remanding this case to the District Court "with instructons to dismiss the complaint for lack of jurisdiction", where (a) rule

15 of the Federal Rules of Civil Procedure accords the petitioner a right to "amend his pleading once as a matter of course at any time before a responsive pleading is served", where (b) no answer to the complaint had yet been filed by the respondents, and where (c) unlike the situation in *Larson* v. *Domestic and Foreign Corp.*, 337 U.S. 682 and *State of Arizona* v. *Hobby*, 94 U.S. App. D.C. 170; 221 F. 2d 498, the suit here is not one seeking to reach property of the United States or to force an officer to act under an admittedly valid statute, but is one seeking to prevent the respondents from destroying property of the Petitioner without any constitutional mandate from Congress to do so and without provision for compensation for such destruction of property.

6 (*Denial of proper "Hearing"*). A question not reached by the Court of Appeals, but proper to be considered by this Court in its discretion, is whether the District Court was in error in concluding that this action was moot, which constituted a final disposition of the case, where such conclusion was based merely on affidavits filed by respondents all of which were founded on hearsay and/or were incompetent in other respects, and where Petitioner was denied a proper "hearing" including the right to cross examine the affiants.

7 (*Injunction Not Futile*). A further question not reached by the Court of Appeals, but proper to be considered by this Court in its discretion is whether; *assuming arguendo* that the affidavits filed by the respondents in the District Court were competent to show a limited publication by respondents of subject matter of Petitioner's invention, without his consent, in a certain few countries; the District Court was in error in finding that this action was moot, where such limited publication would not destroy Petitioner's right to apply for and obtain valid patents for the in-

vention in many other countries in the absence of further publication in such other countries, respectively, which the respondents threatened to promulgate if not enjoined therefrom.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Constitutional provisions, Statutes, and Rules involved, United States Constitution, Article 1, Section 8; 5th Amendment; Atomic Energy Act of 1954, Secs. 1, 2, 3, 11, 141, 142, 146; Patent Act of 1952, Secs. 122, 181; Judicial Code and Judiciary Revision Act, 1948, 28 U.S.C. 1653; Federal Rules of Civil Procedure, Rules 15, and 56, are set forth in Appendix A, *infra*, pp. 1a-5a.

STATEMENT OF THE CASE[1]

PRIOR TO SUIT

Earlier Invention

In 1942, Petitioner invented a "Dual Temperature" process of isotope concentration. (Publication MDDC-891, United States Atomic Energy Commission, 2 pages, declassified February 26, 1947.) Though not under patent assignment agreement when that invention was made, Petitioner in 1943 assigned that invention and application for patent thereon to the Government. That invention was held under a "Secrecy Order" until February 1, 1957, and U. S. Patent No. 2,787,526 issued to the Government thereon April 2, 1957. (R. 2, Complaint para. 2, J.A. 2.) Publication of that invention by the Government is not in issue here.

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[1] This statement is in somewhat more detail than would otherwise be required, because of inaccurate and misleading statements of opposing counsel in prior pleadings, briefs and arguments in this action.

Petitioner was employed at Columbia University by various contractors to the Manhattan Engineering District, predecessor of the A.E.C., from 1943 through June, 1946. After early 1944 that employment had no relation to the aforementioned invention or the invention involved herein, but related to different fields entirely.

Petitioner's New Process; Disclosed to A.E.C. in Confidence

After June, 1946, Petitioner was self-employed during which period he independently invented the improved isotope concentration process, particularly, but not exclusively, adapted for the production of heavy water, involved in the present controversy (hereinafter sometimes called "new process"). On May 27, 1948, he made the existence and availability of his new process known to the A.E.C. (Letter to Burns dated July 2, 1948 attached to Spevack affidavit filed in Court of Appeals, R. 75-76). He disclosed the substance of his new process to the A.E.C. in confidence, in compliance with the spirit of the Atomic Energy Act of 1946, on August 8, 1949 and thereafter. Said disclosures were designated "Classified Security Information" by the A.E.C. (R. 1-3, Complaint, paras. 2, 4, 5, J.A. 1, 2, 3).

Petitioner as Independent Contractor Prepared Report for and Rendered Services to A.E.C.

In October, 1949, pursuant to a special contract with the A.E.C. which expressly referred to and reserved his proprietary rights in the new process, he submitted as an independent contractor, a report showing how the new process could be embodied in a heavy water pilot plant (R. 1-2, Complaint paras. 2, 5, J.A. 1-2; and R. 47, J.A. 47). From 1950 to 1953, Petitioner rendered services to the A.E.C. as an independent con-

tractor under further special contracts which expressly referred to and reserved his proprietary rights in his new process, to be made the subject of a U. S. patent application of Petitioner.

Petitioner's Patent Application; Disclosed to A.E.C. by Patent Office; Secrecy Order

The Petitioner duly filed his U. S. Patent Application on his new process September 29, 1950, S.N. 188,925; a copy thereof was supplied by the Patent Office to the A.E.C. on October 23, 1950, pursuant to 35 U.S.C. Sec. 42 (now 35 U.S.C., Sec. 181, Appendix A, *infra*, p. 4a); and on October 31, 1950, the new process was put under "Secrecy Order" at the instance of the A.E.C. (R. 1, 3, 7, 9, Complaint. paras. 2, 4, 7, and Exhibit A thereto, J.A. 1, 2, 3, 9).

Effect of Secrecy Order

This Secrecy Order directed Petitioner to in no wise disclose the invention, etc. (new process) in any way to any person, under penalties of law, and hence prevented petitioner from taking any steps toward filing foreign patent applications (R. 3, Complaint Para. 8, J.A. 3). Petitioner sought a modification of the Secrecy Order to permit filing of an application in Canada in 1951, but this was denied by the Patent Office at the instance of the A.E.C. (R. 3, R. 10, Complaint, para. 9, J.A. 3 and Exhibit B to Complaint, J.A. 10).

Petitioner's Plea That Respondents Not Publish His Invention

On February 1, 1957, the "Secrecy Order" was rescinded, and at the same time, the A.E.C. declassified and threatened to publish material disclosing the subject matter of Petitioner's patent application (R. 4, Complaint, para. 11, J.A. 4). Petitioner, through counsel, promptly on February 1, 1957 and thereafter attempted unsuccessfully to obtain firm assurance from

the A.E.C. that it would not publish material disclosing the subject matter of his patent application (R. 5, Complaint, para. 14, J.A. 5), pointing out that such publication before he could finance and file patent applications abroad would be a breach of confidence and would destroy property rights of Petitioner in his new process. (R. 4-7 Complaint, paras. 12, 13, 14, 15, 16, 17, J.A. 4-7) and affidavits of Spevack, Parker and Houghton filed in the Court of Appeals. (R. 72-78).

Respondents in Privity With Patent Office

The subject matter of Petitioner's patent application on the new process, all the claims of which have now been allowed by the U. S. Patent Office, is required to be maintained in secrecy by the Patent Office under 35 U.S.C., Sec. 122 (Appendix A, *infra*, p. 4a), and the A.E.C. is in privity with the Patent Office under 35 U.S.C., Sec. 181 (Appendix A, *infra*, p. 4a).

PROCEEDINGS IN DISTRICT COURT (ALL IN 1957)

Suit Filed

When Petitioner's aforementioned efforts failed, he filed on April 10, a Complaint for an Injunction (R. 1, J.A. 1). The jurisdiction of the District Court was invoked under its general powers and equity jurisdiction (R. 1, Complaint, para. 1, J.A. 1) and because the acts threatened by Respondents were "illegal" and "unlawful" (R. 2, Complaint, para. 3, J.A. 2). On April 10 that Court issued a Temporary Restraining Order, *ex parte*, enjoining respondents from publishing the subject matter of petitioner's new process (R. 14, J.A. 14).

Finding of Jurisdiction; Errors; Ground of Decision

On April 18 and 19 proceedings on Petitioner's Motion for Preliminary Injunction were held *in camera* to guard against public disclosures detrimental to Petitioner. The Court specifically found it had jurisdiction and overruled Respondents' contention that this was an unconsented suit against the United States (R. 57-58, J.A. 57, 58). On April 19 *ex parte* affidavits just prepared by employees and agents of Respondents were produced (sole evidence produced by Respondents) which asserted that actions alleged to constitute a publication by Respondents had occurred prior to the institution of this suit. (R. 62-63; J.A. 62-63). The Court denied Petitioner's request to cross-examine the affiants (R. 61, 67; J.A. 61, 67), ignored Petitioner's argument as to the competence of the affidavits (R. 67-71; J.A. 67-71) and denied the motion on the ground of mootness, solely on the basis of said affidavits. The Court issued a Stay pending application to the Court of Appeals (R. 68, J.A. 68). Appeal was noted April 22 (R. 38, J.A. 38).

PROCEEDINGS IN COURT OF APPEALS AND ON MOTION FOR PRELIMINARY INJUNCTION IN THIS COURT (ALL IN 1957)

Stay Continued

On April 26, the Court of Appeals ordered Respondents to refrain from disclosures concerning the new process, and ordered the Clerk to continue the impounding of the record and pleadings. On May 28, the appeal was submitted on briefs.

Ruling of No Jurisdiction

The Court of Appeals, on September 19, issued its opinion that the District Court lacked jurisdiction because this was an unconsented suit against the United

States (Appendix B, *infra*, p. 6a) and entered judgment directing the District Court to dismiss the complaint (Appendix C, *infra*, p. 9a).

Motion to Amend and Petition for Rehearing

On October 1, Petitioner filed in the Court of Appeals a "Motion for Leave to File an Amended Complaint . . ." (Appendix D, *infra*, p. 10a) to amplify the allegations of jurisdiction, grounded upon 28 U.S.C., Sec. 1653, which statute states "defective allegations of jurisdiction may be amended upon terms in trial or appellate courts", and upon F.R.C.P., Rule 15, (Appendix A, *infra*, p. 5a); and gave written notice of the existence of a constitutional question to the Chief Judge of the Court of Appeals in accordance with that Court's Rule 30. (Appendix E, *infra*, p. 17a). On October 4, a Petition for Rehearing, along with certain motions to maintain the status quo, were filed.

Motion and Petition Denied

The Court of Appeals on October 25, denied the Motion for Leave to File an Amended Complaint, etc., (R. 124), and the Petition for Rehearing (R. 123). A stay until October 30 was obtained, within which time Petitioner filed in this Court his Motion for Preliminary Injunction or Stay. On November 2 "Petitioner's Reply to Respondents' Opposition, . . ." (Appendix F, *infra*, p. 18a) was filed, and on November 4 Petitioner's "Supplement to Petitioner's Reply to Respondents' Opposition. . . ." (Appendix G, *infra*, p. 21a) was filed.

Supreme Court Stay

On November 4, the Chief Justice of the United States entered an order enjoining Respondents and

their successors from further disclosures of the new process, on terms. (Appendix H, *infra*, p. 25a).

Substitution of Parties, etc.

Since November 4, the Court of Appeals has entered orders staying transmission of judgment (R. 125) and approving a stipulation (R. 131) amending the complaint with respect to parties, and stipulating that the original and new defendants, unless otherwise ordered by the Court, intend to take the action sought to be enjoined by this suit.

REASONS FOR GRANTING THE WRIT

1. The Writ Should be Granted Because of the Tremendous Importance of the Questions Presented to Our National Welfare and Defense, to the Initiative and Incentive of Scientists and Inventors Cooperating With Government agencies Such as the A.E.C., and to Such Agencies.

This appeal involves issues of extreme importance to the Nation, far broader than those involved in the case itself. It involves issues important to government departments and agencies, to Congress drafting and enacting legislation to be administered by such departments etc., and to the scientists, inventors, and others whose secrets may be entrusted to, or dealt with, by such agencies. It involves the fundamental question of government by law as opposed to government by men. It involves the guarantees of the 5th Amendment to the Constitution of the United States protecting private property.

The question has constantly been asked in connection with this case: "Why would an agency of the United States or its officers want to destroy valuable property rights of a U. S. citizen?" There is no valid answer to this question.

Certainly, it is not in the public interest to have the property rights of a scientist destroyed by officials entrusted with them by law, before he can protect same within his limited means, as Respondents here have unqualifiedly asserted they intend to do.

This case has received considerable comment in professional and trade journals and in the press in connection with the broad aspects of Government policy. An example of this appeared in the eminent chemical engineering journal "CHEMICAL WEEK" for October 5, 1957, p. 52, wherein it is stated that we have in this case an **"important question for industry and individual inventors alike," namely: "By what means can an inventor protect the secrecy of a discovery disclosed to the Government in confidence until he secures United States and foreign patent protection?"** It is submitted that this very important question requires an answer by this Court.

In these days, when scientists and engineers are urgently needed in the race for national survival, it is imperative that their rights be respected and their incentives strengthened through such respect. These considerations and the principles concerned involve basic guarantees intended to be accorded by our form of government and are submitted in all earnestness to warrant consideration by this Court.

2. The Decision Below Misapplies and Fails to Grasp the Essence of the Pronouncements of This Court in Larson v. Domestic & Foreign Corp., 337 U.S. 682; and Confuses the Law of When a Suit Against Officers of the United States Is a Suit Against the Sovereign; and a Writ Should Issue to Settle This Important Question.

The decision of the Court below adds confusion to the law as to when a suit against government officers is a suit against the sovereign. This has frequently been an exceedingly difficult question. The Court of Appeals has misapplied the rulings this Court made in the *Larson* case, and unless reversed its decision will stand as a precedent for the proposition that there is *no distinction* between a suit attempting to reach government property by controlling the exercise of authority validly granted to a government officer (Larson) and a suit which seeks to restrain an officer from dealing with property not owned by the United States without valid statutory authorization (this case).

The Court of Appeals in this case has treated the decision in the *Larson* case as a ruling that whenever a suit against Government officers does not specifically plead *statutory limitation* of the officer's authority or *unconstitutionality* at the outset, such suit should be dismissed without permission to amend the complaint regardless of the facts, and without considering the record as a whole as regards jurisdiction in fact. In so doing the Court below has failed to understand the Larson decision.

The reason dismissal was correct in the *Larson* case and in *Arizona* v. *Hobby*, 94 U.S. App. D.C. 170; 221 F. 2d 498, was because in each of those cases the Plaintiffs were *relying* upon the statute to empower the officer to take the action sought, and hence *could not*

challenge his *statutory authority* or the *validity of the statute* without destroying the basis on which their cases depended. Those cases actually sought only to correct an alleged *error of judgment* of the officer in exercising his authority as agent of the sovereign. In those cases, since an agent's act under a general authority is the act of his principal, it was necessary in order to support jurisdiction to show that the statute relied on by the Plaintiff to empower the agent at all, gave the agent only limited and not a general authority.

That proposition does not apply in the case at bar. Here Petitioner is not relying upon the statute to empower the officer to do what Petitioner wants. Here Petitioner's action rests on the fact that the officer is *not* the agent of the sovereign to publish the Petitioner's invention without his consent. Here under the 5th Amendment to the Constitution of the United States the *sovereign* has no power to take such action without providing for compensation to the Petitioner, and cannot authorize its agent to do so. This situation is thus diametrically opposed to that in the *Larson* case.

Looking to the record as a whole, in *Larson* no contention could be made that the officer was not the agent of the sovereign because he was asked to act as such with respect to *property of the sovereign*. All the plaintiff could urge was that defendant's principal, the sovereign, had by statute restricted defendant's authority so that he was only a limited agent required to do what complainant wanted. Since plaintiff there could point to no such statutory limitation the case was properly dismissed.

Looking at the record as a whole in the present case, however, it has been contended from the outset that the Respondents were not the agents of the sovereign to publish the Petitioner's invention, that the sovereign could not give them such authority without providing for compensation to the Petitioner and has not done so. Here the action rests, not on the existence of valid statutory authority to do the act sought as in the *Larson* case, but on *lack of valid authority to do the act threatened.* Here, therefore, amendment of the complaint to more particularly set out the *lack* of authority, already asserted in the complaint by the charge that the act sought to be enjoined is "illegal" and "unlawful", would not amend the case out of Court as it would have in the *Larson* case; a direct constitutional question is involved, and under 28 U.S.C. Sec. 1653 and F.R.C.P. Rule 15, the Court below, looking at the entire record, should have found jurisdiction to be present, as did the District Court, and should have permitted amendment of the jurisdictional allegation if it deemed such to be necessary.

Appendix G, *infra,* p. 21a, which was filed in support of the Motion for Stay in this Court, cites additional important distinctions between *Larson* and the instant case.

The Court of Appeals decision here holds, in substance, that an inventor who has in secrecy and confidence disclosed his discovery to the A.E.C. is powerless to protect himself by legal action against an arbitrary destruction of such property by A.E.C. officials because the Courts have no jurisdiction of such a suit, it being an unconsented suit against the United States. *Such a rule would obviously be devastating to the morale and incentives of scientists dealing with U.S.*

Government agencies, with consequential deterrent effect upon our scientific progress. This consideration is now of prime importance because of recent foreign scientific developments. The decision is contrary to the rule in the comparable case of *Land* v. *Dollar*, 330 U.S. 731, among others, where it was held that a claim by the plaintiff for the recovery of the possession of stock physically controlled by members of the United States Maritime Commission but alleged to have been wrongfully withheld by them was not inherently a suit against the United States and gave jurisdiction to the court "to determine its jurisdiction by proceeding to a decision on the merits"—that is to determine whether the plaintiffs' claim that withholding of the pledged property was, under the circumstances, tortious and therefore subject to relief against the agents as individuals. 330 U.S. at 739.

Since the decision below, if permitted to stand, would confuse the question of when a suit against government officers is in fact one against the sovereign, and constitutes a serious impediment to scientific cooperation with government, and since the settlement of the law in this respect is of great public importance, the issuance of a Writ is warranted.

3. The Writ Should be Granted Because the Decision of the Court of Appeals in Effect Rules Inter Alia That the Atomic Energy Act of 1954 Is Unconstitutional, and Will be a Precedent in Other Cases if Not Reversed.

It is a fundamental rule of statutory construction that a statute should be construed so as to be constitutional whenever possible. The interpretation of the statute involved herein by the Court below does violence to this rule. Nevertheless such decision by this Court of Appeals is binding at least on the District Court in this Circuit, and persuasive elsewhere, until reversed.

The Court of Appeals here recognized that the Respondents intend to publish subject matter of Petitioner's new process which is the subject of a pending U. S. Patent Application. Nevertheless, it ruled that Congress "authorized the Commission to take actions of this general sort; i.e. to disseminate technical information in the field of atomic energy", (Appendix B, *infra*, p. 6a) and that this general authority includes the authority to publish Petitioner's invention without his consent. It made this ruling notwithstanding that such publication would destroy Petitioner's property rights, and without considering the effect thereof on the constitutionality of the statute under the 5th amendment. It then directed that the complaint in this case be dismissed because, in its view, the claim that the statute is unconstitutional when so construed was not made in the Complaint or in the "Statement of Questions Presented" in Appellant's Brief on Appeal.

The Court of Appeals refused to modify these rulings even though Petitioner's Motion for Leave to File an Amended Complaint (R. 87-94, Appendix D, *infra*, pp. 10a-13a) and his Petition for Rehearing (R. 107-110) pointed out that the ruling made would render the statute unconstitutional and would violate the basic principle of statutory construction; also pointed out in detail the inapplicability of the *Larson* case hereto (R. 97-100); and further pointed out that the record as a whole disclosed that the District Court had considered and overruled the defense of unconsented suit against the United States and had ruled that it had jurisdiction.

It is significant that the statute *does not* expressly authorize Respondents dissemination of unrestricted data *not owned by the U. S.*, and the Court's interpreta-

tion that it does is unreasonable. Furthermore the use of the words "permit" and "encourage" (dissemination) (Appendix A, *infra*, p. 3a) would be unnecessary if the statute contemplated that the A.E.C. could publish such data, as it is not usual for one to "permit" or "encourage" one's self to act. In addition, the Respondents' proposed action here will not "encourage scientific progress" as required by the statute (Appendix A, *infra*, p. 2a).

As a result of the Court of Appeals' erroneous decision, the situation is created in which, unless it is reversed, on the next presentation of a case such as this, the only possible issue may be constitutionality. The allegations will be made that the Court of Appeals *has ruled* that the statute confers the power to publish privately owned information and destroy the property rights of the owner thereof, and that the statute contains no provision for compensation therefor.[2] In such event, unless the District Court should refuse to adopt the ruling of the Court of Appeals in this case, or should find provision for compensation in the Act contrary to the ruling of the agency concerned, (see *Ex Parte Fulmer*, A.E.C. Pat. Comp. Bd. (1950) 86 USPQ 116),[3] it could do nothing except to hold unconstitutional Sections 3(b), 141 and 141(b) of the Act (42 U.S.C. (Supp. IV) Sections 2013(b) 2161, 2161(b)

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[2] There has never been a contention by the Respondents in this case that the statute provides for compensation for the destruction of Petitioner's property by their publication and transfer of it to the public domain in foreign countries.

[3] *Ex Parte Fulmer* ruled with respect to the Atomic Energy Act of 1946 ". . . we find nothing in the (Atomic Energy) Act which would justify consideration of a claim for damages based upon publication of a disclosure made to the Commission." No provision for such compensation was added in the amended Act of 1954.

Appendix A, *infra*, p. 2a). In view of these circumstances the Court below should not have found Respondents to have the power to publish Petitioner's invention in the absence of a prior finding that the statute provides for compensation therefor.

Certainly in its supervisory capacity, the Supreme Court should issue a Writ to clarify the point that even as a basis for dismissing a complaint on technicality of pleadings, a Court should not construe a statute without due regard to the fundamental rule that, whenever possible, it should be construed so as to avoid unconstitutionality.

4. The Court Below Departed From Prevailing Practice in Denying Jurisdiction and Right to Amend, Based on Misapplication of Rulings of This Court.

The Court of Appeals should have determined that jurisdiction existed from an examination of the whole record or should have permitted amendment of complaint under 28 U.S.C. Sec. 1653 and F.R.C.P. 15, and the Liberal Amendment Policy of the Federal Judiciary.

Paragraph 3 of the complaint (R. 2, J.A. 2) alleged that respondents action was "illegal" and "unlawful". Paragraph 12 thereof (R. 4, J.A. 4) alleged that they "have no right to publish . . .". Petitioner's counsel's argument on the preliminary injunction contended that Respondent's action was "ultra vires or beyond their legislative authority." (R. 115-116, Supp. App. A 2-3) and also contended that Respondents' action was a "taking without compensation", etc. (R. 45, J.A. 45). Petitioner's contentions were therefore clear to the trial judge. It was not then deemed, nor is it now conceded, that the allegation requirements of the *Larson* case have any proper application to this

case. (See Point 2, *ante*, pp. 14-17) The District Court stated:

> ". . . I will say to you that, in my judgment, the Court has jurisdiction . . ." (R. 57, J.A. 57).
> ". . . I realize that that goes contrary to the government's view that I don't have any jurisdiction, but I have ruled that out . . ." (R. 58, J.A. 58)

Cases which indicate that inadequate allegations of jurisdiction may be cured by sources other than by amendment to the complaint such as by testimony or examination of the whole record are cited at length in the Petition for Rehearing below (R. 103-107). See also *Keene Lumber Co.* v. *Leventhal*, C.A.A. 1, 1948, 165 F. 2d 815, citing *Norton* v. *Larney*, 1925, 266 U.S. 511, 515, 516.

An alternative to such procedure would have been to grant Petitioner's Motion to Amend his Complaint (Appendix D, *infra*, p. 10a) in accordance with 28 U.S.C. Sec. 1653, F.R.C.P. 15 (no answer having been filed), and the extremely liberal Federal Court policy of allowing amendments, and to have then proceeded to consider the merits.

An additional reason for allowing amendment is the fact that a dismissal for want of jurisdiction would not be *res adjudicata*, and Petitioner could file a new complaint properly alleging jurisdiction. At the very least the Court should have amended its order to permit amendment of complaint after remand, as was done in *Molnar* v. *National Broadcasting Co., Inc.*, C.A. 9th, 1956, 231 F. 2d 684, 22 FR Serv. 8a.11, Case 1, and *Columbian Nat. Life Ins. Co.* v. *Harrison*, C.C.A. Tenn., 1926, 12 F. 2d 986.

While most of the cases cited above and in the Petition for Rehearing relate to defective allegations of

diversity of citizenship, 28 U.S.C. Sec. 1653 is not so limited as was its predecessor, former Section 399. 3 *Moore's Federal Practice,* para. 1509, p. 838.

The Court of Appeals thus in effect has construed the *Larson* case to abrogate the usual rules for finding jurisdiction and for amendment of jurisdictional allegations in all cases against government officers, even in such as are basically the same as the case of *Land* v. *Dollar,* 330 U.S. 731, and a writ is warranted to rectify this situation and clarify the law in this regard.

5. This Case Is not "Moot"; the Conclusions of the District Court, Not Ruled Upon by the Court of Appeals, Represent a Gross Miscarriage of Justice Warranting Exercise of This Court's Power of Supervision of the Federal Judiciary.

Petitioner was not accorded a "hearing" in the District Court, as contemplated by F.R.C.P., Rule 65(a), which reads "Rule 65, Injunctions. (a) Preliminary; Notice. No preliminary injunction shall be issued without notice to the adverse party"; in that he was refused the requested opportunity to cross-examine the affiants whose affidavits were presented (R. 61, 67, 68, J.A. 61, 67, 68). Cases hold that the provision for "notice" therein contemplates a "hearing" with the right to present oral testimony, *and* the right to cross-examine opposing witnesses. See 7 *Moore's Federal Practice,* 2nd Ed. par. 65.04(3), p. 1637, quoting from *Sims* v. *Greene,* C.C.A. 3, 1947, 161 F.2d 87, 88-89. See also, 3 *Barron and Holtzoff,* 1956 pocket part, par. 1433, p. 104, which states in part: ". . . Doubtful questions of law and fact should not be determined on affidavits on an application for preliminary injunction . . .", (citing cases) and

7 *Moore's Federal Practice*, 1638, which states: "On the hearing for the injunction . . . the court should normally be reluctant to decide controverted factual issues in favor of movant (or against him) on the basis of affidavits alone". This would seem to be particularly important unless some standard as to the contents of the affidavits is required, such as that of F.R.C.P., Rule 56(e) (Appendix A, *infra*, p. 5a) which the District Court failed to do. Otherwise, extremely important cases could be disposed of on Motion for Preliminary Injunction on flimsy affidavits, without the right of cross-examination. See 7 *Moore's Federal Practice*, p. 1640. This was vainly urged upon the Trial Court (R. 61, 67, 68, J.A. 61, 67, 68).

Even assuming arguendo that no hearing was required, and that the affidavits presented were competent, they did not prove the case moot. In many countries, as shown by the affidavits of Parker, Spevack and Houghton (R. pp. 72-78), there must be a publication in the country concerned, as distinguished from another country or countries, in order to destroy an inventor's right to obtain a patent in the country concerned. There was no showing of a publication in every country in the world, and thus no showing of complete mootness. (See also in this regard Appendix G, *infra*, p. 24a).

The District Court's conclusion of law was thus improperly founded upon a mere assumption of fact.

The extrapolation of conclusions of law dispositive of the case, if not reversed, from mere assumptions based on incompetent affidavits, and without a proper "hearing", represents a gross miscarriage of justice, warranting issuance of a writ.

CONCLUSION

Because the erroneous decision below has in the respects above noted raised questions of great public interest, as well as questions of Constitutional interpretation and unconstitutionality of the Atomic Energy Act of 1954 and ancillary questions of law and procedure, all of which should be settled by this Court, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CARLETON U. EDWARDS II,
JOSEPH Y. HOUGHTON,
BERNARD MARGOLIUS,
Attorneys.

APPENDIX A

Constitutional Provisions, Statutes and Rules Involved

UNITED STATES CONSTITUTION.

Article 1, Section 8, reads in part as follows:

"The Congress shall have power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;" . . .

Amendment V—Due Process Clause, reads in part as follows:

"No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

ATOMIC ENERGY ACT OF 1954.

August 30, 1954, c. 1073, Sec. 1; 68 Stat. 921 et seq.; 42 U.S.C. (Supp. IV) Sec. 2011 et seq.:

"CHAPTER 1. DECLARATION, FINDINGS, AND PURPOSE

"SECTION 1. (68 Stat. 921; 42 U.S.C. Sec. 2011) DECLARATION.—Atomic energy is capable of application for peaceful as well as military purposes. It is therefore declared to be the policy of the United States that—

• • •

"b. the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.

"SEC. 2. (68 Stat. 921; 42 U.S.C. Sec. 2012) FINDINGS.—The Congress of the United States hereby makes the following findings concerning the development, use, and control of atomic energy:

• • •

"b. In permitting the property of the United States to be used by others, such use must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public."

* * *

"SEC. 3. (68 Stat. 922; 42 U.S.C. Sec. 2013) PURPOSE.—It is the purpose of this Act to effectuate the policies set forth above by providing for—

"a. a program of conducting, assisting, and fostering research and development in order to encourage maximum scientific and industrial progress;

"b. a program for the dissemination of unclassified scientific and technical information and for the control, dissemination, and declassification of Restricted Data, subject to appropriate safeguards, so as to encourage scientific and industrial progress;

* * *

"f. a program of administration which will be consistent with the foregoing policies and programs, with international arrangements, and with agreements for cooperation, which will enable the Congress to be currently informed so as to take further legislative action as may be appropriate."

"CHAPTER 2. DEFINITIONS

"SEC. 11. (68 Stat. 922; 42 U.S.C. Sec. 2014) DEFINITIONS.—The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions. As used in this Act:

* * *

"r. The term 'Restricted Data' means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 142."

* * *

"CHAPTER 12. CONTROL OF INFORMATION

"SEC. 141. (68 Stat. 940; 42 U.S.C. Sec. 2161) POLICY.— It shall be the policy of the Commission to control the dissemination and declassification of Restricted Data in such a manner as to assure the common defense and security. Consistent with such policy, the Commission shall be guided by the following principles:

• • •

"b. The dissemination of scientific and technical information relating to atomic energy should be permitted and encouraged so as to provide that free interchange of ideas and criticism which is essential to scientific and industrial progress and public understanding and to enlarge the fund of technical information."

"SEC. 142. (68 Stat. 941; 42 U.S.C. Sec. 2162) CLASSIFICATION AND DECLASSIFICATION OF RESTRICTED DATA.—

"a. The Commission shall from time to time determine the data, within the definition of Restricted Data, which can be published without undue risk to the common defense and security and shall thereupon cause such data to be declassified and removed from the category of Restricted Data.

"b. The Commission shall maintain a continuous review of Restricted Data and of any Classification Guides issued for the guidance of those in the atomic energy program with respect to the areas of Restricted Data which have been declassified in order to determine which information may be declassified and removed from the category of Restricted Data without undue risk to the common defense and security."

• • •

"SEC. 146. (68 Stat. 943; 42 U.S.C. Sec. 2166) GENERAL PROVISIONS.—

"a. Sections 141 to 145, inclusive, shall not exclude the applicable provisions of any other laws, except that no Gov-

ernment agency shall take any action under such other laws inconsistent with the provisions of those sections.

"b. The Commission shall have no power to control or restrict the dissemination of information other than as granted by this or any other law."

* * *

PATENT ACT OF 1952:

"SEC. 122. CONFIDENTIAL STATUS OF PATENT APPLICATIONS. —Applications for patents shall be kept in confidence by the Patent Office and no information concerning the same given without authority of the applicant or owner unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined by the Commissioner [of Patents]" (July 19, 1952, c. 950, sec. 1, 66 Stat. 801; 35 U.S.C. 122).

"SEC. 181. SECRECY OF CERTAIN INVENTIONS AND WITHHOLDING OF PATENT.— . . . Whenever the publication or disclosure of an invention by the granting of a patent, in which the Government does not have a property interest, might, in the opinion of the Commissioner [of Patents] be detrimental to the national security, he shall make the application for patent in which such invention is disclosed available for inspection to the Atomic Energy Commission, . . .

. . . If, in the opinion of the Atomic Energy Commission . . . the publication or disclosure of the invention by the granting of a patent therefor would be detrimental to the national security, the Atomic Energy Commission, . . . shall notify the Commissioner [of Patents] and the Commissioner [of Patents] shall order that the invention be kept secret and shall withhold the grant of a patent for such period as the national interest requires, and notify the applicant thereof . . .

. . . The Commissioner [of Patents] may rescind any order upon notification by the heads of the departments and the chief officers of the agencies who caused the order to

be issued that the publication or disclosure of the invention is no longer deemed detrimental to the national security." (July 19, 1952, c. 950, Sec. 1, 66 Stat. 805; 35 U.S.C. Sec. 181)

JUDICIAL CODE AND JUDICIARY REVISION ACT, 1948 (June 28, 1948, c. 646, 62 Stat. 944; 28 U.S.C. Sec. 1653:

"Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 15. AMENDED AND SUPPLEMENTAL PLEADINGS. (in part)

"(a) AMENDMENTS. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . ."

Rule 56. SUMMARY JUDGMENT.

"(e) "FORMS OF AFFIDAVITS; FURTHER TESTIMONY. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13834

JEROME S. SPEVACK, APPELLANT

v.

LEWIS L. STRAUSS, *et al.*, APPELLEES

Appeal from the United States District Court
for the District of Columbia

Decided September 19, 1957

Messrs. Carleton U. Edwards, II, Joseph Y. Houghton and *Bernard Margolius* submitted on the brief for appellant.

Messrs. Oliver Gasch, United States Attorney, and *Lewis Carroll* and *E. Riley Casey*, Assistant United States Attorneys, submitted on the brief for appellees.

Before EDGERTON, *Chief Judge*, and WILBUR K. MILLER and BURGER, *Circuit Judges*.

EDGERTON, *Chief Judge:* The appellant's complaint asked the District Court to enjoin the defendants, who are the members of the United States Atomic Energy Commission, and to enjoin also the "officers, agents, servants and employees, and anyone associated with or acting in concert or participation with said defendants, and their successors in office", from disclosing "the heretofore unpublished features" of appellant's patent application No. 188,925, which pertains to the production of heavy water and other isotopes. The complaint says such publication would defeat

patent applications appellant plans to file in various foreign countries; that a "secrecy order" of the Commission formerly prohibited appellant from filing those applications; that if appellant had been able to file them within one year after he filed his patent application in the United States, in most countries his filing would have been regarded as "running from the date of" his United States application; and that the Commission has now rescinded the secrecy order and declassified the entire subject of the preparation of heavy water, including the plaintiff's patent application.

The District Court denied an injunction on the ground that previous publications had made the plaintiff's claim moot. We do not reach the question of mootness.

Though the complaint says the defendants "are sued only in their individual capacities", it is plain that the injunction the appellant seeks would, if valid, restrain the United States Atomic Energy Commission from taking certain action. It is also plain that Congress authorized the Commission to take action of this general sort; *i.e.*, to disseminate technical information in the field of atomic energy. Congress did not leave the matter to implication. It expressly stated its intention to provide "a program for the dissemination of unclassified scientific and technical information and for the control, dissemination, and declassification of Restricted Data, subject to appropriate safeguards, so as to encourage scientific and industrial progress . . . It shall be the policy of the Commission to control the dissemination and declassification of Restricted Data in such a manner as to assure the common defense and security. . . . The dissemination of scientific and technical information relating to atomic energy should be permitted and encouraged . . ." 42 U.S.C. (Supp. IV) §§ 2013(b), 2161, 2161(b).

The legal theory asserted in appellant's complaint is that the "Defendants having received confidential disclosure of

the subject matter of the said application have no right to publish the same or any reports dealing with such confidentially disclosed subject matter"; also, that "defendants having prevented the plaintiff from pursuing his right to apply for foreign patents . . . and having by said Classification and Secrecy Order prevented the plaintiff from even effectively negotiating for financing of such applications, are in equity and good conscience bound, on removing such classification and secrecy order, to make no publication even of information, if any, that they might otherwise have a right to publish, that would prevent the plaintiff from pursuing his remaining rights to seek foreign patents corresponding to said application, at least until the plaintiff has had a reasonable time in which to arrange for financing and pursuit of such rights."

The appellant has not "set out in his complaint the statutory limitation", if any, which might indicate that if, as he claims, a publication would violate his rights, it would also exceed the Commission's authority.[1] In effect the complaint comes only to this, that the Commission should be restrained because it is about to err, to the appellant's damage, in exercising its authority. Accordingly we cannot distinguish this case from the *Larson* case, in which the Supreme Court held that the courts lacked jurisdiction. As in *Larson* the United States has not consented to be sued; and like *Larson*, this is not a case "in which the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional." *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 690. The complaint makes no such claim. Neither does appellant's "Statement of questions presented", in his brief on this appeal.[2]

---

[1] He now makes, but the complaint does not, the paradoxical suggestion that the Commission is authorized to publish *only* classified or restricted information.

[2] His reply brief does seek to raise a constitutional question. It says: "For the Commission to effect dissemination of privately

We think the District Court erred in rejecting the government's contention that the suit is against the United States. We therefore remand the case with instructions to dismiss the complaint for lack of jurisdiction. *State of Arizona* v. *Hobby*, 94 U.S. App. D.C. 170, 221 F. 2d 498.

Remanded.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,834

JEROME S. SPEVACK, *Appellant*,

v.

LEWIS L. STRAUSS, ET AL., *Appellees*.

Appeal from the United States District Court for the District of Columbia.

Before: EDGERTON, Chief Judge, and WILBUR K. MILLER and BURGER, Circuit Judges.

Judgment

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Columbia, and was submitted on the briefs of the parties.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court

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owned secret information without provision for compensation would be a wanton violation of plaintiff's rights under the due process clause of the Fifth Amendment of the Constitution. If the Atomic Energy Act purported to confer any such authority on the Commission, it would be unconstitutional." But if the District Court lacked jurisdiction of the complaint, arguments made here cannot supply it.

appealed from in this cause be, and the same is hereby, set aside, and that this cause be, and it is hereby, remanded to the said District Court with instructions to dismiss the complaint for lack of jurisdiction.

Dated: September 19, 1957.

Per Chief Judge EDGERTON

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,834

JEROME S. SPEVACK, *Appellant*,

v.

LEWIS L. STRAUSS, ET AL., *Appellees*.

Motion for Leave to File Accompanying Amendments to Complaint and to Vacate Opinion and Judgment Entered September 19, 1957

Appellant moves the Court for leave to file the accompanying amendments to his complaint and to vacate the opinion and judgment entered in this action on September 19, 1957. While appellant believes that the complaint, as originally filed, sufficiently alleged jurisdiction, this motion is made in view of the ruling of this Court, and under the authority of the Judicial Code and Judiciary Revision Act of 1948, 28 U.S.C. 1653, and Federal Rule 15, no answer having been filed to this complaint by defendants, appellees here.

This Court, by decision rendered on September 19, 1957, ordered that this case be remanded with instructions to

dismiss the complaint for lack of jurisdiction. The opinion stated that the plaintiff had not set out in his complaint the statutory limitation, if any, which would indicate that the defendants were exceeding their statutory authority, nor had the complaint alleged that the defendants were acting under an unconstitutional statute and that in the absence of one or the other of such allegations, the action was in effect an unconsented suit against the United States which could not be maintained.

It is contended that in the absence of a specific prohibition to the contrary, upon remand, the appellant would have a right to move the District Court for leave to amend his complaint to properly allege jurisdiction. See *Columbian Nat. Life Ins. Co.* v. *Harrison*, C.C.A. Tenn. 1926, 12 F. 2d 986, where it was held that omission of record in federal appellate court to show requisite diversity of citizenship may be supplied after remand.

However, such circuitous procedure is not necessary in that the Judicial Code and Judiciary Revision Act of 1948, 28 U.S.C. 1653, states that "defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts". See *Van Sant* v. *American Exp. Co.*, C.A. Pa. 1948, 169 F. 2d 355 which held that where petition for rehearing on appeal attacked for first time plaintiff's allegation of residency as basis for diversity of citizenship, motions to amend pleadings to show facts regarding diverse citizenship basis of action were properly before appellate court. See also *Keene Lumber Co.* v. *Leventhal*, C.C.A. Mass. 1948, 165 F. 2d 815, where it was held that missing allegations to show diversity of citizenship may be supplied by amendment at any stage of the proceedings, even in the appellate court, upon such terms as the court may impose.

While the foregoing cases apply principally to amendments to correct allegations as to diversity of citizenship,

Section 1653 is not limited to correcting diversity of citizenship allegations as was its predecessor, former Section 399. In this regard *3 Moore's Federal Practice*, para. 1509, page 838, states in part as follows: "The new section does not eliminate any right of amendment existing under the former statute, but instead it broadens the statutory authorization to permit amendment of all jurisdictional allegations instead of merely allegations of diversity of citizenship as provided by its predecessor, former Section 399."

Under the extremely liberal rules for allowing amendments of the pleadings as are presently effective in the Federal judicial system, appellant should be granted leave to amend his complaint to make the necessary allegations of jurisdiction at this stage, and be afforded an opportunity to obtain a ruling on the merits of this appeal without the necessity of having the case remanded to the District Court, and there seeking such amendment. In addition, such amendment should be allowed so as not to delay final disposition of this appeal, and such further proceedings or review as may be appropriate.

This Court, in its decision of September 19, 1957, discussed some aspects of the statutory authority of the Atomic Energy Commission to disseminate information, and may have assumed that such authority applied without regard to whether the subject matter is owned by the United States or privately. Appellant contends that appellees' attempt and intention to "publish" the appellant's privately owned property, is in excess of the statutory authority granted to the appellees, or in the alternative, if the authority is deemed to have been granted, under the facts here existing, the statute is unconstitutional as a deprivation of private property without due process of law and without provision for compensation, as will be

more fully urged in the Petition for Rehearing to be filed herein, if necessary.

/s/ Carleton U. Edwards, II
Carleton U. Edwards, II
1000 Vermont Avenue, N. W.

/s/ Joseph Y. Houghton
Joseph Y. Houghton
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Attorneys for Appellant

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,834

Jerome S. Spevack, *Complainant-Appellant*

v.

Lewis L. Strauss, et al, *Defendants-Appellees*

Amendments to Complaint

With the approval of the Court, the Complaint in this cause is hereby amended by interlineation as follows:

(*Amendment to be added at the end of numbered paragraph 1 of the complaint*)

"This Court has jurisdiction of this action also because the contemplated acts sought to be enjoined herein are not acts which the defendants are authorized to perform in their official capacity as agents for and on behalf of the United States, in that either such contemplated acts are not within the limits of authority conferred on the

defendants by the Atomic Energy Act of 1954 (Public Law 703, 83rd Cong., Approved Aug. 30, 1954; C. 1073, 68 Stat. 921; 42 U.S. Code Secs. 2011-2281), or in that said Act, if construed to confer such authority on the defendants, as applied to the facts of this case, is unconstitutional as a deprivation of private property without provision for compensation therefor, in violation of the Due Process clause of the Fifth Amendment to the Constitution of the United States, as hereinafter more fully appears."

(New paragraph 18 to be added following numbered paragraph 17 of the complaint)

"18. (The contemplated publication is not constitutionally authorized by statute). The statutory authority of the defendants is defined by the Atomic Energy Act of 1954. That Act does not authorize the defendants to "publish" a private citizen's invention disclosed to defendants in confidence and destroy property rights of the private owner thereof without the owner's consent, as is here involved. It does not provide for compensation for such publication and destruction. In more detail:

(a) The Act grants to the defendants broad powers to use, and to communicate privately to others for use, under suitable safeguards and for certain purposes, "Restricted Data" (Sec. 141; 42 U.S.C. 2161), and provides for compensation for such use and for damages flowing from such private communication (Sec. 173; 42 U.S.C. 2223); however, it limits "Restricted Data" to data that has not been declassified and removed from the category of "Restricted Data", as has the plaintiff's invention (Sec. 11r; 42 U.S.C. 2014r).

(b) The Act grants to the defendants power to permit "property of the United States" to be used by others under suitable safeguards (Sec. 2b, Sec. 3, 42 U.S.C. 2012b, 2013; etc.); however, the invention here concerned is not property of the United States.

(c) The Act declares the policy of the United States in granting certain authority to the defendants to be that they shall direct their activities so as to "strengthen free competition in private enterprise" (Sec. 1b; 42 U.S.C. 2011(b), not so as to destroy property acquired by free enterprise. Its purpose in providing for a "program for the dissemination of unclassified scientific and technical information" (Sec. 3b); 42 U.S.C. 2013b is stated to be to effectuate the policies (*inter alia*, to permit use of "property of the United States" and to "strengthen free competition in private enterprise") set forth in Sections 1 and 2 of the Act. 42 U.S.C. 2011, 2012.

(d) With respect to unclassified scientific and technical information which is the property of a private citizen, the Act authorizes the defendants only to "permit" (the private owner) and "encourage" (the private owner) to disseminate the same (Sec. 141b; 42 U.S.C. 2161b); and specifies that the defendants shall determine what Restricted Data "can be published" (by the owner thereof) and "*shall thereupon cause such data to be declassified and removed from the category of Restricted Data*" (Sec. 142a). (42 U.S.C. 2162(a)) The Act does not in this connection say that the defendants—shall publish—or even that they—may publish—the declassified data without regard to the property rights of a private citizen therein, but to the contrary specifies that the determination of what "can be published" shall be subject to the applicable provisions of any other laws (such as the undertaking by the Government that the Patent Office (and those in privity with it) shall maintain patent applications secret under Sec. 122 of the Patent Act of 1952, 35 U.S. Code, Sec. 122), and specifies that the defendants "shall have no power to control or restrict the dissemination of information other than that granted by this or any other law" (Sec. 146). 42 U.S.C. 2166

(e) The limited authority conferred by Sections 141-146 (42 U.S.C. 2161-2166) of the Act does not imply that the

defendants, entrusted with a privately owned invention, "shall publish" the invention without regard to the property rights of the owner thereof. The Act does not provide for compensation for any such publication; hence properly construed it does not authorize such publication; or if construed to authorize such publication merely because it does not expressly prohibit the same, it is to that extent, as applied to this controversy, unconstitutional as a deprivation of property without due process of law or provision for compensation therefor, under the due process clause of the Fifth Amendment to the Constitution of the United States."

/s/ JEROME S. SPEVACK
Jerome S. Spevack

/s/ CARLETON U. EDWARDS, II
Carleton U. Edwards, II

/s/ BERNARD MARGOLIUS
Bernard Margolius
1000 Vermont Avenue, N. W.
Washington, D. C.

/s/ JOSEPH Y. HOUGHTON
Joseph Y. Houghton
1317 F Street, N. W.
Washington, D. C.

Attorneys for Plaintiff

DISTRICT OF COLUMBIA, ss:

Jerome S. Spevack, being first duly sworn, on oath, deposes and says that he is the appellant in this action, that he has read the foregoing Amendments to Complaint, and that the matters and things therein set forth are true to the best of his knowledge, information and belief.

/s/ JEROME S. SPEVACK
Jerome S. Spevack

Subscribed and sworn to before me this 1st day of October, 1957.

/s/ JEAN A. WEST
Notary Public D. C.

[Seal]

My commission expires: May 14, 1961

APPENDIX E

Law Offices
Bernard Margolius
Carleton U. Edwards, II
Ralph H. Deckelbaum

Telephone
STerling 3-2667

Suite 309 Wire Building
1000 Vermont Avenue, N. W.
Washington 5, D. C.

October 4, 1957

The Honorable Henry W. Edgerton
Chief Judge of the United States
Court of Appeals for the
District of Columbia Circuit
Washington, D. C.

Re: Spevack v. Strauss, et al.
No. 13,834

Dear Judge Edgerton:

I am writing this letter to inform the Court in accordance with the Court's Rule 30 that it is contended by the appellant, Jerome S. Spevack, in the captioned case, that as a result of this Court's opinion of September 19, 1957 in this case that certain sections of the Atomic Energy Act of 1954, 42 U.S.C.A. 2011-2281, are unconstitutional, as applied to the facts of this particular case, if the aforementioned opinion is correct.

Appellant's principal contention is that the statute is constitutional, but has been incorrectly interpreted; but,

in the event he is incorrect in this contention, then as previously mentioned, he contends that some sections of the said Act are unconstitutional, as applied to the specific facts involved. These contentions are all more particularly set forth in a motion for leave to amend the complaint filed in this Court on October 1, 1957 and a petition for rehearing filed in this Court on October 4, 1957.

I have delivered a copy of this letter to Oliver J. Gasch, United States Attorney, this date.

Very truly yours,

/s/ CARLETON U. EDWARDS, II
Carleton U. Edwards, II

CUE:ja

APPENDIX F

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1957

JEROME S. SPEVACK, *Petitioner*,

v.

LEWIS L. STRAUSS, ET AL.

Petitioner's Reply to Respondents' Opposition to Motion for Preliminary Injunction or a Stay

1. UNCONSTITUTIONALITY OF STATUTE. Respondents point out on page 6 of their opposition that "Nowhere in his present motion does petitioner in any way attempt to point out therein the statute is unconstitutional." This important aspect of the case was overlooked in the haste of drafting and redrafting the motion, and is explained herein.

It is, and has been throughout this action, the respondents' position that the Atomic Energy Act commands them

to disseminate information such as is here involved. The Court of Appeals adopted this contention in its opinion. The departure comes between the parties on *what* information respondents are directed to publish by the Act. The Court of Appeals has interpreted these sections as directing the respondents to publish the information *whether it is owned by the A.E.C. or not.* Petitioner has consistently contended that there is no provision for compensation in the Act or elsewhere, if such a publication should be made, and that, therefore, these provisions apply only to information owned by the A.E.C. Any other interpretation, under the circumstances, would be in violation of the due process clause of the Fifth Amendment, and therefore unconstitutional, as it would result in destruction of petitioner's property rights.

Respondents in paragraph 7 state "the government has not and does not intend to publish his patent application". While this may be literally true, they do intend to publish the processes and contents thereof in a different form, and with identical effect.

The use of the words "permitted" and "encouraged" bolsters petitioner's contentions, because the respondents would not have to "permit" or "encourage" themselves to disseminate scientific and technical information.

In addition, the sections relied upon by the respondents apply to "restricted data", which would not include the data here involved since it was removed from this category on February 1, 1957. The act, 42 U.S.C. 2223, provides for compensation to owners of "restricted data" where it is communicated by respondents, but makes no such provision where respondents disseminate restricted data which has been declassified, such as here involved. This is significant.

In Ex Parte Fulmer, A.E.C. Pat. Comp. Bd., (1950) 86 USPQ 116, a tribunal of the A.E.C. held that the Act

does not authorize the Commission to publicly disseminate privately owned information received in confidence.

Summarizing, Courts will not construe a statute so as to render it unconstitutional, if such construction can be avoided. The act does not say that the respondents shall effect dissemination or publication of information entrusted to them without regard to the rights of the owners thereof, which contention was adopted by the Court of Appeals. This important constitutional question has not, and should be answered, and decided.

2. Unconsented Suit and Mootness. Petitioner contends, and at the proper time can demonstrate, that this action is distinguishable from the *Larson* case in at least six important respects. The question of mootness was decided by the trial court on incompetent hearsay affidavits, without the opportunity of cross-examination, and was erroneous as a matter of law. In any event, and as a matter of law, the action, at the very most, was only partially moot, and subsequent developments have indicated that the information has never been received by industry or the public.

3. Conclusion—Under these circumstances, this Court should grant the stay until it has had the opportunity to review the Petition for Writ of Certiorari.

Respectfully submitted,

APPENDIX G

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1957

JEROME S. SPEVACK, *Petitioner*

v.

LEWIS L. STRAUSS, ET AL., *Respondent*

Supplement to "Petitioner's Reply to Respondents' Opposition to Motion for Preliminary Injunction or a Stay"

1. THIS IS NOT AN UNCONSENTED SUIT AGAINST THE UNITED STATES. The instant case is distinguishable from the case of *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 69 S. Ct. 1457 in many important respects. In the Larson case plaintiff, a private corporation brought suit in U. S. District Court for the District of Columbia against the Administrator of the War Assets Administration, an agency of the United States, in his official capacity. The Complaint alleged that the administration had sold certain surplus coal to the plaintiff, but had refused to deliver it and had made a new contract to sell it to others. The prayer was for an injunction prohibiting the Administrator, his agents and all persons acting under their direction, from selling or delivering the coal to anyone other than the plaintiff and for a declaration that the sale to the plaintiff was valid and the sale to the second purchaser invalid. There was no allegation that the contract of sale was with the Administrator personally, no allegation of any statutory limitation on his powers as a sales agent, and no claim that his action constituted an unconstitutional taking of property. It was held: The suit was one against the United States and the District Court was without jurisdiction.

In *Larson*, there was no question as to the defendant's statutory authority to make and perform the contract to sell the government property involved. Here, to the con-

trary, there is a vigorous contention that defendants have no statutory authority to perform the acts sought to be enjoined, i.e. to publish plaintiff's invention and destroy certain of his property rights therein.

In *Larson*, there was no question, and in fact could not be any valid contention that defendant was acting under an unconstitutional statute, because plaintiff was attempting to compel defendant *to act* under the statute, which was concededly valid. Here, alternative claims exist. Plaintiff contends that properly construed, the Atomic Energy Act is valid, and that it does not authorize defendants to publish (and thereby destroy) certain property rights in his invention, it being contended that the statute authorizing publication of information applies only to *property owned by the United States*. If the Court interprets the act as giving the defendants the authority to publish the information involved, the plaintiff contends that the statute is unconstitutional as applied to these particular facts, as constituting a deprivation of property without due process and compensation as required by the Fifth Amendment to the U. S. Constitution.

In *Larson*, the only question was whether the defendant was erring in the exercise of his authority. Here plaintiff contends, as previously indicated, that defendants are either exceeding their authority, or acting under an unconstitutional statute.

In *Larson*, plaintiff had a remedy for breach of contract by the defendant in the Court of Claims under 28 U.S.C. 1491. See *Joplin* v. *United States*, 1939, 89 Ct. Clms. 345. Here, plaintiff, if the injunction is denied, has no relief available, which is known. In fact, in the case *In Re Fulmer*, Atomic Energy Commission, Patent Compensation Board, 1950, 86 USPQ 116, under somewhat similar circumstances, the plaintiff made a claim for compensation for his loss occasioned by publication of his invention. The Board states in part:

"Our jurisdiction is created and limited by the terms of the (Atomic Energy) Act, and we find nothing in the Act which would justify consideration of a claim for damages based upon publication of a disclosure made to the Commission."

In *Larson*, the remedy sought would have required "*affirmative action* by the sovereign, or the disposition of unquestionably sovereign property" (Id., 337 U. S. 691, 69 S. Ct. 1457), or in other words the transfer of the ownership of the coal from the U. S. to the plaintiff. Here, no affirmative action is required. All that is desired is that defendants cease or refrain from the act of publishing the novel matter of the disclosure of plaintiff's patent application. The U. S. Court of Appeals for the District of Columbia has recognized the difference between affirmatively requiring a government officer to take some action, and prohibiting him from taking action in *Seiden* v. *Larson*, 88 App. D. C. 258, 188 F. 2d 661.

In *Larson*, the property involved was concededly property of the United States. Here there has been no claim that the United States owns the novel matter of the disclosure of plaintiff's patent application, and no such claim could in fact validly be made.

The rule is well defined. Where the officer's acts are ultra vires, specific relief is always available. *School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, 107, 108; *Philadelphia Company* v. *Stimson*, 223 U.S. 605; *Waite* v. *Macy*, 246 U.S. 606; *Santa Fe Pac. R. Co.* v. *Fall*, 259 U.S. 197; *Payne* v. *Central Pac. R. Co.*, 255 U.S. 228; *Work* v. *Louisiana*, 269 U.S. 250; *Ickes* v. *Fox*, 300 U.S. 82; *Land* v. *Dollar*, 330 U.S. 731.

Specific relief is similarly available where the acts are unconstitutional. *Osborn* v. *Bank of the United States*, (Wheat 738; *Pennoyer* v. *McCannough*, 140 U.S. 1; *Smyth* v. *Ames*, 169 U.S. 466; *Prout* v. *Starr*, 188 U.S. 537; *Ex parte Young*, 209 U.S. 123; *Sterling* v. *Constantin*, 287 U.S. 378.

If defendant's actions here are beyond the statutory authority, relief may be had without invading the sovereign immunity. The defendants deny that their actions are unauthorized. To resolve the dispute, however, requires consideration of the merits.

Summarizing this point, plaintiff contends, that there are substantial distinctions between the Larson case and this case, which distinctions remove the instant case from being an unconsented suit against the United States.

2. THIS CASE IS NOT MOOT. This question has not been reviewed by the U. S. Court of Appeals. The Respondents' contention in the District Court that this case was moot was based on their contention that the information in question had already been published, which fact their counsel apparently had not learned of until the day or the day before the motion for the preliminary injunction was heard. Respondents attempted to prove this point by incompetent affidavits, which were based upon hearsay and were deficient in other respects as a matter of fact and of law. Petitioner sought but was denied the right to cross examine the affiants. According to Petitioner's view of this matter, these affidavits actually only generally showed preparations toward publication in institutions under the control of the Respondents.

At most, which is not conceded, they showed publication in three countries. The law is, in a great number of countries, that there must be a publication in that country in order to prevent one from applying for and obtaining a patent. In some countries, the publication anywhere in the world will destroy such rights. Petitioner contends that, under these circumstances, even assuming arguendo that a publication was effected in some countries there are still numerous countries where Petitioner retains the right to apply for and obtain a patent upon his process. Under these circumstances, the case was only partially moot and Petitioner should be granted relief. These and the other

matters mentioned on behalf of the Petitioner in this Court may, of course, more fully be explained upon the petition for a writ of certiorari.

Respectfully submitted.

* * *

APPENDIX H

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No.

JEROME S. SPEVACK, *Petitioner*,

v.

LEWIS L. STRAUSS, HAROLD VANCE, DR. WILLARD LIBBY, and THOMAS MURRAY.

Order

Upon consideration of the application of counsel for the petitioner and of the opposition of the Solicitor General thereto,

IT IS HEREBY ORDERED that Lewis L. Strauss, Harold S. Vance, Dr. Willard Libby, and Thomas Murray, and each of them, their officers, agents, servants, and employees, and all persons in active concert and participation with them, and their successors in office be, and the same are hereby, enjoined from the further promulgation or disclosures or from the communication or dissemination of prior disclosures, concerning the improved processes involved in petitioner's patent application as described in his complaint filed in the United States District Court for the District of Columbia.

This order is conditioned upon the filing of the petition for certiorari on or before December 4, 1957. Should such petition be filed on or before that date, this stay is to con-

tinue pending action on said petition. In the event petition for certiorari is granted, the stay is to continue pending issuance of the judgment of this Court.

/s/ EARL WARREN
Chief Justice of the United States

Dated this 4th day of
November, 1957.